United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: November 7, 2006

TO : Dorothy L. Moore-Duncan, Regionl Director
Region 4

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Banta Tile and Marble Co.
Case 4-CA-34569 530-6083-1000
Inter-State Tile & Mantel Co. 530-8045-8700
Case 4-CA-34579
Harrisburg Marble, Inc.
Case 4-CA-34658

This case was submitted, pursuant to OM 04-83, for advice as to whether the Union has met its burden of showing that it has Section 9(a) relationships with the subject signatory construction industry Employers.

We conclude that the Region should issue complaint in order to argue, based on current Board law as set forth in Central Illinois Construction,[1] that the parties' relationship was governed by Section 9(a) rather than Section 8(f). Accordingly, the complaint should allege that the Employer violated Section 8(a)(5) by withdrawing recognition from the Union after the collective bargaining agreement expired. However, the Region should further argue that the better view of the law would require the Board to overrule Central Illinois to the extent that that case would preclude the Board from reviewing the circumstances of the Employer's initial grant of recognition.

A. Under Current Board Law, the Employer's Relationship With the Union Was Governed By Section 9(a) Rather Than 8(f)

There is a significant difference between a union's representative status in the construction industry under Section 8(f) and under Section 9(a) of the Act. Under Section 8(f), an employer may terminate the bargaining relationship upon expiration of the agreement.[2] Under Section 9(a), an employer must continue to recognize and bargain with the union after the agreement expires, unless

[1] 335 NLRB 717 (2001).

[2] See, e.g., Central Illinois Construction, 335 NLRB at 718.

and until the union is shown to have lost majority support.[3] In the construction industry, there is also a rebuttable presumption that a bargaining relationship is governed by Section 8(f).[4] Therefore, a party asserting the existence of a 9(a) relationship has the burden of proving it.[5]

In Central Illinois, the Board reaffirmed that contract language alone may establish a Section 9(a) relationship. Adopting the Tenth Circuit's three-part test to determine the sufficiency of the contract language,[6] the Board held that Section 9(a) status is established with contract language that unequivocally indicates (1) that the union requested recognition as the majority or 9(a) representative of the unit employees, (2) that the employer recognized the union as the majority or 9(a) bargaining representative, and (3) that the employer's recognition was based on the union having shown, or having offered to show, that it had the support of a majority of unit employees.[7] The agreement need not contain specific terms or "magic words;" however, the contract language should accurately describe events that would independently establish the creation of a 9(a) relationship.[8]

Since 1993, Article II, Section 2 of the collective-bargaining agreements between the Union and the three subject Employers has contained the following language:

> Inasmuch as the Union has submitted proof and the Employer is satisfied that the Union represents a majority of its employees in the bargaining unit described herein, the Employer recognizes the

---

[3] Id.

[4] John Deklewa & Sons, 282 NLRB 1375, 1385 n.41 (1987), enfd. 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

[5] Central Illinois, 335 NLRB at 721.

[6] See 335 NLRB at 719-20, citing NLRB v. Triple C Maintenance, Inc., 219 F.3d 1147, 1155 (10th Cir. 2000) and NLRB v. Oklahoma Installation Co., 219 F.3d 1160, 1164 (10th Cir. 2000).

[7] Central Illinois, 335 NLRB at 719-720.

[8] See, e.g., Saylor's, Inc., 338 NLRB 330, 334 (2002) (contract language need not specifically state language in compliance with Central Illinois standard where there is a clear intent to satisfy each element of Board test).

> Union, pursuant to Section 9(a) of the National Labor Relations Act, as the exclusive collective bargaining agent for all employees within that bargaining unit, on all present and future jobsites within the jurisdiction of the Union, unless and until such time as the Union loses its status as the employee's exclusive representative as the result of an NLRB election requested by the employees. The Employer agrees that it will not request an NLRB election.

This language satisfies the first two elements of the Central Illinois test. The statement that "the Employer recognizes the Union, pursuant to Section 9(a) of the National Labor Relations Act, as the exclusive collective bargaining agent for all employees within that bargaining unit" establishes both that the Union requested recognition as the 9(a) representative and that the Employers recognized it as such.[9] The language is modeled after the parallel provision in Sheet Metal Workers' International Association Local 19, v. Herre Brothers, which was found to be adequate to establish a Section 9(a) relationship.[10]

The parties' agreement also satisfies the final element of the Central Illinois test, requiring a statement that the Union made a contemporaneous offer to show or an actual showing of majority support. The language in Article II, Section 2 of the collective-bargaining agreements has provided since 1993 that "the Union has submitted proof and the Employer is satisfied that the Union represents a majority of its employees in the bargaining unit." This language unequivocally states that the Union showed and that the Employer, upon review of evidence, recognized that the Union had the support of a majority of unit employees.[11] Accordingly, under Central

---

[9] See, e.g., NLRB v. Triple C Maintenance, Inc., 219 F.3d at 1155-56.

[10] Sheet Metal Workers Local 19 v. Herre Bros., Inc., 201 F.3d 231, 242 (3d Cir. 1999) (finding contractual language established 9(a) relationship even absent specific reference to Section 9(a) where language stated recognition would continue "unless and until such time as the [u]nion loses its status as the employees exclusive representative as a result of an NLRB election. . . .")

[11] See, e.g., Saylor's, Inc., 338 NLRB at 330 (contract language sufficient to establish 9(a) relationship where it stated that union "submitted to the [e]mployer evidence of majority support").

Illinois, the Union's relationship was governed by Section 9(a), rather than Section 8(f), and therefore the Employer unlawfully withdrew recognition and failed to bargain with the Union in 2006.

Under existing Board law, the Employer also would be precluded from making its current assertion, which the Union does not dispute, that the Union never demonstrated majority support at the time of the recognition. In Casale Industries,[12] the Board refused to permit an RC petitioner to challenge the incumbent union's majority status where the challenge was based on events at the time of recognition made approximately six years earlier, and the employer at that time had expressed its intent to enter into a 9(a) relationship with the union. The Board noted that in non-construction industries, if an employer grants Section 9(a) recognition to a union and more than six months elapse, the Board would not entertain a claim that majority status was lacking at the time of recognition. The Board found that unions in the construction industry should not be treated less favorably than those in non-construction industries. Accordingly, the Board concluded that "if a construction industry employer extends 9(a) recognition to a union, and six months elapse without a charge or petition, the Board should not entertain a claim that majority status was lacking at the time of recognition."[13] While the Board has subsequently raised questions about Casale,[14] the case remains Board law.

---

[12] 311 NLRB 951, 953 (1993).

[13] Ibid.

[14] In Central Illinois, the Board indicated that where the recognition language is couched in terms of the union's "offer to show" majority support, an employer may challenge the union's majority support, but that any such challenge must be made within six months after the written recognition was given as required by Section 10(b) of the Act. 335 NLRB at 720 n.14. By contrast, the Board specifically left open the issue of "whether an employer would be permitted to make a similar challenge within the 10(b) period [emphasis added] where the language it agreed to unequivocally stated that the union did make (as opposed to "offered to" make) a showing of majority support." Ibid. Consistent with Central Illinois' questioning whether employers would be permitted to challenge their own contractual acknowledgment of majority status (even within the 10(b) period), the Board in Nova Plumbing, 336 NLRB 633, 634-36 (2001), enf. den. 330 F.3d 531 (D.C. Cir. 2003), did not rely on 10(b) in finding a 9(a) relationship based on contract language. However, although raising

In this case, the language in Article II, Section 2 of the collective-bargaining agreements between the Union and the three subject Employers clearly expresses the Employer's intent to enter into a 9(a) relationship with the Union, the parties signed the collective-bargaining agreements in 1993, and the challenge to the Union's having demonstrated majority status occurred more than six months (in fact, 13 years) afterwards. Thus, under current Board law, the Employer's challenge to the Union's majority status at the time of recognition is time-barred under Section 10(b).

B. The Region should ask the Board to modify its decision in Central Illinois, that contract language, standing alone, is sufficient to establish a Section 9(a) relationship.

Although the Region should issue complaint, absent withdrawal, the Region should further argue, as the General Counsel directed in Lambard, Inc.[15] and D & B Fire Protection, Inc.,[16] that the better view would require the Board to overrule Central Illinois to the extent that it precludes the Board from reviewing whether the Union actually enjoyed majority support at the time the employer purported to grant it Section 9(a) recognition.

In Nova Plumbing, Inc. v. NLRB,[17] the D.C. Circuit rejected the Board's determination that contract language alone can establish a Section 9(a) relationship between a union and a construction industry employer, "at least where, as [there], the record contains strong indications that the parties had only a Section 8(f) relationship."[18] The D.C. Circuit asserted that the "Board has neglected its fundamental obligation to protect employee section 7

---

questions about the status of the Board's prior 10(b) policy, neither Nova nor Central Illinois overruled Casale, an R case.

[15] Case 31-CA-27033 (July 7, 2005) (Significant Appeals Minute 05-13).

[16] Case 21-CA-36915 (Advice memorandum dated December 9, 2005).

[17] 330 F.3d 531 (D.C. Cir. 2003).

[18] Id. at 537.

rights,"[19] reasoning that the Central Illinois test "creates an opportunity for construction companies and unions to circumvent both section 8(f) protections and [Bernhard-Altmann's] holding by colluding at the expense of employees and rival unions"[20] and concluded that the Board's reliance on contract language, standing alone, to establish a 9(a) relationship "runs rough shod" over the principles established in International Ladies' Garment Workers' Union v. NLRB (Bernhard-Altmann).[21]

In the instant case, while the recognition clause clearly states that the Employer recognized the Union based on the Union's contemporaneous showing of evidence of its majority support, the Union has not proffered evidence that it demonstrated majority support at the time the 9(a) language was inserted into the 1993 collective-bargaining agreements and admits, as presently claimed by the Employers, that it did not demonstrate majority support by a showing of authorization cards. The Union's proffered evidence consists solely of stating that a majority of employees were Union members and that the Employers knew that a majority of their employees were Union members. In Deklewa, the Board noted that it is well established that union membership is not always an accurate barometer of union support.[22] In Central Illinois,[23] the Board reiterated that the use of employee union membership is insufficient to establish majority support, and specifically overruled any post-Deklewa case that may be read to imply that an agreement indicating that a union represents a majority or has a majority of members in a unit, without more, is sufficient to establish 9(a) status. Accordingly, the evidence here fails to establish that the

---

[19] Id.

[20] Id.

[21] Ibid., citing 366 U.S. 731 (1961). In Bernhard-Altmann, the Supreme Court found that a Section 9(a) collective bargaining agreement that recognizes a union as an exclusive bargaining representative must fail in its entirety where, at the time the agreement was signed, only a minority of the employees actually authorized the union to represent them.

[22] 282 NLRB at 1375.

[23] 335 NLRB at 720.

Union actually demonstrated majority support at the time the Employers granted it Section 9(a) recognition.[24]

As the D.C. Circuit noted, allowing contract language alone to create a 9(a) relationship creates an opportunity for construction industry companies and unions to collude at the expense of employees, who would be precluded from filing an R-case petition during the term of a 9(a) contract under contract bar rules.[25] The employees' rights under Sections 7 to reject an 8(f) relationship should not be defeated without some evidence to support the words drafted by highly interested parties. These rights would be better served by a rule that would bind the Employer and the Union to their bargain, unless either party[26] comes forward with evidence that the Union lacked majority support at the time of recognition, while permitting employees to challenge that Union's 9(a) status at any time through an RD petition. If an employee files an RD petition, or if an employer presents evidence that the union did not have majority support at the time of recognition, a test like that often used in voluntary

---

[24] The Board should be urged to overrule Triple A Fire Protection, 312 NLRB 1088 (1993), enfd. 136 F.3d 727 (11th Cir. 1998), cert. den. 525 U.S. 1067(1999) (remanding to ALJ for determination of legality of unilateral changes) and MFP Fire Protection, 318 NLRB 840 (1995), enf'd. 101 F.3d 1341 (10th Cir. 1996) (employer unlawfully repudiated 9(a) relationship), both of which involved a "1987 Acknowledgement Form," to the extent that in those cases it applied Casale Industries, 311 NLRB at 953, to shield from inquiry whether the claims in the Acknowledgement Form were accurate.

[25] Other cases also illustrate that same point. In Triple C Maintenance, 327 NLRB 42 n.2, 44-45 (1998), enfd. on other grounds, 219 F.3d 1147 (10th Cir. 2000), for instance, the employer and the union executed a collective-bargaining agreement that included language stating that recognition was based on a "clear showing of majority support" even though the employer had no statutory employees at the time of recognition. Similarly, in Oklahoma Installation Company, 325 NLRB 741 (1998), enf. denied on other grounds, 219 F.3d 1160 (10th Cir. 2000), the parties' agreement indicated that the union represented a majority of employees although there were no employees working within the jurisdiction of the union at the time of recognition.

[26] While the same rule would apply to a union as to an employer, we will refer only to the Employers as it is the Employers who are challenging the 9(a) relationship here.

recognition and contract bar cases in non-construction industries would better protect employee rights. That test emphasizes that "[t]he essence of voluntary recognition is the 'commitment of the employer to bargain upon some demonstrable showing of majority [status].'"[27] The Board has used a similar test in declining to find a recognition bar to an election where it does not "affirmatively appear" that an employer extended recognition in good faith "on the basis of a previously demonstrated showing of majority."[28]

The Board formerly had just such a test in the construction industry.[29] As the Tenth Circuit noted in Triple C Maintenance, in its original form the Board's test required extrinsic evidence of a contemporaneous showing of majority support and not, as in later cases, a bare recitation of that fact in a contract. That later development was a permissible one;[30] however, in view of the criticism that the Central Illinois standard invites abuse,[31] the Board's former extrinsic evidence test would better serve the interests of the parties and the public where employees are challenging the union's 9(a) status or

---

[27] NLRB v Lyon & Ryan Food, Inc., 647 F.2d 745, 751 (7th Cir. 1981), cert. den. 454 U.S. 894 (1981), quoting Jerr-Dan Corp., 237 NLRB 302, 303 (1978), enfd. 601 F.2d 575 (3rd Cir. 1979). Accord, Brown & Connolly, 593 F.2d 1373, 1374 (1st Cir. 1979).

[28] Sound Contractors Assoc., 162 NLRB 364, 365 (1966); Jack Williams, D.D.S., 231 NLRB 845, 846 (1977).

[29] See Golden West, 307 NLRB 1494, 1495 (1992); Id. at 1495 n.5, 1496 (opinions of Member Stephens and Member Oviatt); J&R Tile, Inc., 291 NLRB 1034, 1036 & n.11 (1988). See also Island Construction, 135 NLRB 13 (1962) (finding contract bar under these principles).

[30] 219 F.3d at 1155.

[31] See Nova Plumbing, 330 F.3d at 536-37, discussed above. See also American Automatic Sprinkler Systems, Inc. v. NLRB, 163 F.3d 209, 222 (4th Cir. 1998) ("[T]o credit the employer's voluntary recognition absent any contemporaneous showing of majority support would reduce this time-honored alternative to Board-certified election to a hollow form which, though providing the contracting parties stability and repose, would offer scant protection of the employees free choice that is a central aim of the Act."), cert. denied 528 U.S. 821 (1999); Saylor's, Inc., 338 NLRB at 330-33 (Member Cowen, dissenting) (quoting American Automatic Sprinkler Sys. Inc., 163 F.3d at 222).

where the employer has presented evidence that the union did not in fact enjoy majority status at the time of the 9(a) recognition. For these reasons, this case should be presented to the Board with a request that it modify its holding in Central Illinois that contract language alone is sufficient to establish 9(a) majority status when a party presents evidence to the contrary.

Under our proposed standard, contractual language that meets the standards set forth in Central Illinois will be sufficient to establish a rebuttable presumption of 9(a) status as to the employer who is a party to the contract. The employer may rebut the presumption of 9(a) status at any time by presenting evidence that the union did not actually enjoy majority support at the time of the purported 9(a) recognition. If the employer presents such evidence, the union then has the burden to present sufficient evidence to establish that it did in fact have majority support at that time. If the union is unable to rebut the employer's contention that it lacked majority support, the employer has successfully established that the parties do not have a 9(a) relationship.

Since employees are not parties to the recognition clause, where an employee challenges a union's 9(a) status, the union will be presumed to be an 8(f) representative and the contractual language will not create a rebuttable presumption of 9(a) status. Under Deklewa, employees will be free to file an appropriate representation petition during the term of contract. Upon filing such a petition, the burden of introducing evidence supporting the claim that the union did, in fact, have majority support at the time of recognition would be on the party alleging that a 9(a) relationship exists[32]. If that party is unable to meet this burden, the contractual language, standing alone, would be insufficient to establish such a relationship and the contract would not block the election.[33]

---

[32] This proposed rule is consistent with H.Y. Floors and Gameline Painting, Inc., 331 NLRB 304, 304-305 (2000), where the Board held that the employer and the union had a collective bargaining agreement that constituted a 9(a) contract vis-à-vis each other; however, the decertification petitioner was not a party to the agreement and was not estopped from timely challenging the 9(a) recognition.

[33] The General Counsel notes that proposed rule could create a scenario in which a union could file a meritorious 8(a)(5) charge against an employer at the same time that an employee filed a representational petition with the Board. The General Counsel determined that in such a case the Board should exercise its discretion to determine whether

In this case, the Employers contend that, despite contract language to the contrary, there is no evidence that the Union demonstrated majority support in 1993 when the Employer purportedly granted 9(a) recognition, or at any subsequent time. The employees are not challenging the Union's 9(a) status. Therefore, under our proposed standard, the contract language only created a rebuttable presumption of 9(a) status, and the Employer has met its burden of establishing that the Union did not enjoy majority support at the time of the agreement. While the recognition clause clearly states that the Employer recognized the Union based on the Union's contemporaneous showing of evidence of its majority support, the Union has not proffered evidence that it demonstrated majority support at the time the 9(a) language was inserted into the 1993 collective-bargaining agreement, and admits that it did not demonstrate majority support by a showing of authorization cards. Instead, the Union's proffered evidence consists solely of stating that a majority of the Employers' employees were Union members, a fact which, under well settled law, is insufficient to establish that it represented a majority of unit employees.[34] Therefore, the evidence is sufficient to rebut the presumption of 9(a) status created by the contract language.

Because current Board law would preclude the Employer from actually challenging the Union's 9(a) status because more than six months had passed before it withdrew recognition from the Union, the Region should urge the Board to reconsider its policy under Casale of treating voluntary 9(a) recognition in the construction industry under the same set of 10(b) rules that apply to employers outside of that industry, as established in Machinists Local 1424 v. NLRB (Bryan Mfg.).[35] The Region should

---

an election would effectuate the policies of the Act. See Panda Terminals, Inc., 161 NLRB 1215, 1223-24 (1966). Since the union's unfair labor practice charge alleges conduct related to the unresolved question of representation in the employees' petition, the General Counsel would argue that the employees R-case petition should proceed first, while the union's unfair labor practice charge is held in abeyance.

[34] See supra at note 22.

[35] 362 U.S. 411 (1960). Bryan Mfg. involved an 8(b)(1)(A) charge filed by an employer alleging that the union did not have majority support at the time of recognition, which occurred 10 months prior to the filing of the charge. The Supreme Court found that the charge was time-barred under

further argue, as the General Counsel directed in Lambard, Inc.[36] and D & B Fire Protection, Inc.,[37] that the Board should reconsider its application of Casale in the setting of a complaint alleging a Section 8(a)(5) withdrawal of recognition.

In making this argument, the Region should point out that Casale's premise is that parties in the construction industry who clearly intend a 9(a) relationship are entitled to the benefit of the same six-month rule that protects parties outside the construction industry from belated claims that majority status was lacking at the time of recognition.[38] That policy of parity, while abstractly fair and reasonable, does not fully take account of the legal and practical differences that warrant different treatment for the construction industry. Under Section 8(f), construction employers and employees are not similarly situated with those in other industries insofar as a six-month rule for challenging 9(a) recognition is concerned. The plain language of Section 8(f) states that, in the construction industry, recognition of a union that has not been selected by a majority of the bargaining unit "shall not be an unfair labor practice."[39] This statutory

---

10(b) for the entire foundation of the unfair labor practice was the union's time-barred lack of majority status when the original collective bargaining agreement was signed. 362 U.S. at 418. However, the Court stated that 10(b) does not prevent all use of evidence relating to events transpiring more then six months prior to the charge. Instead, in situations where occurrences in the 10(b) period in and of themselves may constitute, as a substantive matter, unfair labor practices, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period. Id. at 416.

[36] Case 31-CA-27033 (July 7, 2005) (Significant Appeals Minute 05-13).

[37] Case 21-CA-36915 (Advice memorandum dated December 9, 2005).

[38] 311 NLRB at 953.

[39] In relevant part, Section 8(f) provides (emphasis supplied):

> *It shall not be an unfair labor practice* under subsections (a) and (b) of this section for an employer engaged primarily in the building and

language presents a formidable obstacle to the Board's ever finding an unfair labor practice where a construction industry employer grants 9(a) recognition to a construction union that in fact lacks majority support.[40] Absent an unfair labor practice, Section 10(b)'s six month statute of limitations for filing unfair labor practice charges with the Board has no application.

The Region should ask the Board to reconsider Casale's rationale for engrafting a six-month rule for challenging 9(a) recognition in the construction industry. Casale is vulnerable to the criticism that it attempts to grant a 9(a) protected status to bargaining relationships in the construction industry in circumstances where the language of 8(f) suggests that a different treatment would better accord with Congress' intent. A better rule, more tailored to the legal and practical realities of construction

---

> construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) *because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement . . . .*

Note that we deal here only with *uncoerced* 9(a) recognition where the sole issue, as in Bernhard-Altmann, is whether the union granted recognition had the support of a numerical majority. Coerced support for a construction union is in no way privileged by 8(f). To the contrary, by its express terms, Section 8(f) affords no protection if the union signatory to the agreement is "assisted by an action defined in section 8(a) of this Act as an unfair labor practice…." 29 U.S.C. 158(f). See, e.g., Precision Carpet, 223 NLRB 329, 340 (1976) (threatening employees with discharge for refusing to join the union).

[40] Accord, Nova Plumbing, 330 F.3d at 538-39; American Automatic Sprinkler Sys. v. NLRB, 163 F.3d at 218 n.6. See also Triple A Fire Protection, 312 NLRB at 1089 n.3 (Member Devaney, concurring) (relying solely on "the parties clear expression of their intent" to find a 9(a) relationship and declining to rely on 10(b) in construction industry cases because in that industry "there is no statutory prohibition on minority recognition").

industry bargaining, is not a rule of parity like that announced in Casale, but the rule under Brannan Sand & Gravel.[41] That rule allows claims of full 9(a) status to be appropriately challenged by employers and employees beyond the 10(b) period. Moreover, because 8(f) privileges non-majority bargaining relations in the construction industry, a rule allowing the Board to examine whether a union had majority support at the time of recognition does not involve any determination concerning whether the recognition was an unfair labor practice.[42]

In sum, because Casale's six month time limit neither has a functional relationship to the critical differences between a 9(a) relationship and an 8(f) relationship nor has a firm legal basis in view of 8(f)'s privileging non-majority bargaining in the construction industry, the Region should urge the Board to overrule Casale and adopt a rule that would allow the Board to look beyond the 10(b) period to determine whether a union actually had majority support at the time it was recognized as a 9(a) representative.

B.J.K.

---

[41] 289 NLRB 977 (1988).

[42] The Region, however, should not ask the Board to overrule Casale in its entirety. That matter was presented to the Board in the guise of an R case, in which the Board was not asked to go beyond Section 10(b) to find legal culpability. Moreover, as set forth above, in the R-case setting, Casale is premised on reasonable evidentiary factors and notions of fairness. The Region should merely ask the Board to reconsider its application of Casale in the setting of a complaint alleging a Section 8(a)(5) withdrawal of recognition.